

DEPARTMENT OF STATE REVENUE
SUPPLEMENTAL LETTER OF FINDINGS NUMBER 97-0614
RESPONSIBLE OFFICER
SALES TAX and WITHHOLDING TAX
For Tax Periods: 1993-1997

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Issues

Sales and Withholding Tax -Responsible Officer Liability

Authority: IC 6-2.5-9-3, IC 6-3-4-8 (f), IC 6-8.1-5-1 (b), Indiana Department of Revenue v. Safayan, 654 N.E. 2nd 270 (Ind.1995) at page 273.

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The taxpayer protests the assessment of responsible officer liability for unpaid corporate sales and withholding taxes.

Statement of Facts

The taxpayer was a shareholder and officer of a corporation that did not remit the proper amount of sales and withholding taxes to Indiana. The taxpayer was personally assessed for the taxes and timely protested these assessments. A hearing was held. More facts will be provided as necessary.

Sales and Withholding Tax -Responsible Officer Liability

Discussion

The proposed sales tax liability was issued under authority of IC 6-2.5-9-3 that provides as follows:

An individual who:

- (1) is an individual retail merchant or is an employee, officer, or member of a corporate or partnership retail merchant; and
- (2) has a duty to remit state gross retail or use taxes to the department;

holds those taxes in trust for the state and is personally liable for the payment of those taxes, plus any penalties and interest attributable to those taxes, to the state.

The proposed withholding taxes were assessed against Taxpayer pursuant to IC 6-3-4-8(f), which provides that “In the case of a corporate or partnership employer, every officer, employee, or member of such employer, who, as such officer, employee, or member is under a duty to deduct and remit such taxes shall be personally liable for such taxes, penalties, and interest.”

Indiana Department of Revenue assessments are prima facie evidence that the taxes are owed by the Taxpayer who has the burden of proving that assessment is incorrect. IC 6-8.1-5-1 (b).

Pursuant to Indiana Department of Revenue v. Safayan 654 N.E. 2nd 270 (Ind.1995) at page 273: “The statutory duty to remit trust taxes falls on any officer or employee who has the authority to see that they are paid. The factors considered to determine whether a person has such authority are the following:

1. The person’s position within the power structure of the Corporation;
2. The authority of the officer as established by the Articles of Incorporation, By-laws or employment contract; and
3. Whether the person actually exercised control over the finances of the business including control of the bank account, signing checks and tax returns or determining when and in what order to pay creditors.

Id. At 273.

The taxpayer was the president of the corporation at the time of its incorporation. He contends, however, that he resigned as president on September 23, 1993. In support of this contention, the taxpayer submitted a copy of a letter to the Board of Directors of the corporation that informed them that he resigned his “positions as officer and director” of the corporation. The bill of sale for the corporation indicates that the taxpayer was the president again on February 18, 1997.

The Secretary of State’s office provided a copy of the Articles of Incorporation. Those Articles listed the taxpayer as the registered agent of the corporation. There was no listing of officers or designation of duties of the various officers. No copy of the corporate By-laws was available.

The Indiana Department of Revenue must consider that presidents generally have the ultimate control and responsibility for any corporation.

The final indicium concerns the actual control over the finances of the corporation. The taxpayer alleges that he did not control the finances during the period when the tax liabilities accrued. Three former employees submitted affidavits indicating that the taxpayer was not actively involved in the management of the corporation during the period from May, 1993 through January, 1996. Other documentation such as bank statements, a tax return and checks indicated that another officer actually ran the corporation and controlled the corporate finances during that period. The taxpayer admits, however, that he reentered the management of the corporation by February, 1996. Evidence indicates that after that date he dealt with the suppliers, wrote corporate checks, inquired of the Indiana Department of Revenue to determine the outstanding corporate trust tax liability, prepared and filed tax returns and negotiated the sale of the corporation on February 18, 1997. During that final year of the corporation's operation, the taxpayer had actual knowledge of the corporate trust tax liability and chose to pay other creditors. Based upon the taxpayer's business expertise and certification as a C.P.A., the taxpayer is charged with the knowledge that he was personally responsible for the corporate sales and withholding tax liabilities. He was clearly an officer with the duty to remit the corporate trust taxes to Indiana.

Finally, the taxpayer alleges that another officer was actually the officer responsible for the remittance of taxes. The law does not require, however, that only one person be considered the person with a duty to remit taxes to the state. In the Safayan case, the corporate president was held to be a responsible person even though the day to day operations were specifically delegated to a vice-president in his employment contract as manager. "A party may be liable for trust taxes without having exclusive control over the corporation's funds." Safayan at 274. Another officer's possible responsibility for the remittance of taxes does not absolve the taxpayer from responsible officer liability.

Finding

The taxpayer's protest is denied.